PRESCRIPTION OTHER THAN IN FEE. — In early times the basis of prescription was the claim of an easement which for time out of mind the owners of the dominant tenement had enjoyed at the expense of the servient. This may have given rise to the rule that prescription can only be in fee, for a right not permanent in its nature could hardly have been exercised from time immemorial. When the cumbrous doctrine of immemorial usage gave way to the more convenient fiction of a lost grant by the servient to the dominant owner,[1] the nature of the right supposed to have been granted did not change, and the fiction was invoked only to establish such easements as could have been prescribed for at common law.[2] A conclusive presumption of a lost grant could, therefore, be made only in respect to an easement which was in its nature a permanent incumbrance on the land. Accordingly it was held that prescription did not run against a tenant for years, for such prescription would have necessarily bound the reversioner, and the court would have been in the anomalous position of conclusively presuming a grant which the tenant had no power to make,[3] and which could have no effect on the reversion had it in fact been made.[4]

In a recent English case where the plaintiff and defendant were both tenants of the same landlord, the question arose whether the continued user of a way on the plaintiff's land gave the defendant an easement. The court held that the defendant had acquired no such right. *Kilgour* v. *Gaddes*, 116 L. T. 341 (Eng., C. A.). It may be doubted whether an easement for the remainder of the plaintiff's term could not have been acquired under the second and eighth sections of the English Prescription Act,[5] and there is some authority to support this view.[6] But if we adopt the view that the Prescription Act applies only to such easements as could have been prescribed for at common law,[7] the result in the principal case necessarily follows, for under the doctrine of a lost grant, prescription could be only in fee, and would not run against a tenant so as to bind his landlord.

It may be questioned whether the result of the principal case would be reached in this country, since in a majority of jurisdictions the doctrine of a lost grant has been discarded, and rights are held to be acquired by prescription solely on the analogy of the statute of limitations.[8] It is true that under this statute adverse possession for the required period against the particular tenant can never affect the rights of a remainderman or reversioner, since possession cannot be adverse to him who has no right of action.[9] Nevertheless, the effect of such possession is to vest in the disseizor whatever title the particular tenant had.[10] There seems to be no reason, therefore, why an easement for a term of years might not be acquired in this country by prescription, nor would this be an undesirable result.

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1 16 HARV. L. REV. 438.
2 Wheaton *v.* Maple, [1893] 3 Ch. 48.
3 Barker *v.* Richardson, 4 B. & A. 579.
4 Gayford *v.* Moffat, L. R. 4 Ch. App. 133.
5 St. 2 & 3 Will. IV. c. 71.
6 Beggan *v.* McDonald, L. R. 2 Ir. 560.
7 Bright *v.* Walker, 1 C. M. & R. 211.
8 Okeson *v.* Patterson, 29 Pa. St. 22.
9 Tilson *v.* Thompson, 10 Pick. (Mass.) 359.
10 Moore *v.* Luce, 29 Pa. St. 260.